Supreme Court, U.S.
FILED
06-45 JUN 11 2006
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No.

IN THE

# Supreme Court of the United States

Paul Christopher Penley, PETITIONER

*v.*

Collin County, Texas; Charles Sandoval, Judge of the 380th District Court of Collin County, Texas; Tom O'Connell; Lisa Renfro, Court Reporter of the 380th District Court; John Roach, District Attorney of Collin County, Texas,

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether a suit for damages under 42 U.S.C. § 1983 for alleged intentional, bad faith destruction of DNA evidence, precluding post-conviction DNA testing under Texas State law, "*necessarily implies*" that the Petitioner's conviction was unlawful, under this Court's holding in *Heck v. Humphrey*, 512 U.S. 477 (1994)?

Whether the Court of Appeals' decision is contrary to this Court's holding in *Heck v. Humphrey*, 512 U.S. 477 (1994)?

Whether the Court of Appeals improperly applied the holding in *Heck v. Humphrey*, 512 U.S. 477 (1994) to Petitioner's claims for damages under 42 U.S.C. § 1983, for alleged intentional, bad faith destruction of DNA evidence, precluding post-conviction DNA testing under Texas State law?

Whether Petitioner's claims for damages resulting from post-conviction destruction of DNA evidence, in violation of a Texas state statute allowing post-conviction DNA testing, are cognizable under 42 U.S.C. § 1983?

Whether the Court of Appeals decision should be reversed and remanded for reconsideration in light of this Court's decision in *Hill v. McDonough*, 546 U.S. _____, 126 S.Ct. 2096 (decided June 12, 2006)?

# TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

RELEVANT PROVISIONS INVOLVED ..... 1

STATEMENT ..... 1

REASONS FOR GRANTING THE PETITION ..... 6

CONCLUSION ..... 13

APPENDIX

*Circuit Court Opinion* ..... 1a

*District Court Order* ..... 4a

*Post Conviction DNA Motions, National Conference of State Legislatures, November 2003)* ..... 23a

*Relevant Provisions Involved* ..... 36a

## TABLE OF AUTHORITIES

Page

**CASES**

ARIZONA V. YOUNGBLOOD, 488 U.S. 51, 109 S.CT. 333, 337, 102 L. ED. 2D 281 (1988) ..... 2

EDWARDS V. BALISOK, 520 U.S. 641, 117 S.CT. 1584, 137 L.ED.2D 906 (1997) ..... 10, 11, 13

GORE, INC. V. ESPY, 87 F.3D 767, 771 (5TH CIR.1996) ..... 15

HECK V. HUMPHREY, 512 U.S. 477 (1994) ..... *passim*

HILL V. MCDONOUGH, 546 U.S. ___, 126 S.CT. 2096 (DECIDED JUNE 12, 2006) ..... 7, 12

LUJAN V. DEFENDERS OF WILDLIFE, 504 U.S. 555, 560, 112 S.CT. 2130, 119 L.ED.2D 351 (1992) ..... 15

MARBURY V. MADISON, 5 U.S. (1 CRANCH) 137, 163 (1803) ..... 8

MUHAMMAD V. CLOSE, 540 U.S. 749, 750, 124 S.CT. 1303, 1304, 158 L.ED.2D 32 (2004) (PER CURIAM) ..... 9, 11, 12

NELSON V. CAMPBELL, 541 U.S. 637, 124 S.CT. 2117, 158 L.ED.2D 924 (2004) ..... *passim*

RAINES V. BYRD, 521 U.S. 811, 818, 117 S.CT. 2312, 138 L.ED.2D 849 (1997) ..... 15

RODRIGUEZ, 411 U.S. 475, 93 S.CT. 1827, 36 L.ED.2D 439 (1973) ..... 7, 9

ROSE V. LUNDY, 455 U.S. 509, 102 S.CT. 1198, 71 L.ED.2D 379 (1982) ..... 10

WATSON V. STATE, 96 S.W.3D 497, 500 (TEX.APP.-AMARILLO 2002, PET. REF. 2003) ..... 8, 13

WYATT V. STATE, 2005 WL 729960 ..... 13, 14

**STATUTES**

28 U.S.C. § 2254(b)(1)(A) ..... 10

28 U.S.C. Section 1254 ..... 1

42 U.S.C. § 1997e(a) ..... 11

42 U.S.C. § 1983 ..... 6, 7, 9

42 U.S.C. §§ 1983 & 1985 ..... 1, 2

TEX.CODE CRIM. PROC. ARTS. 64.01-64.05 (VERNON SUPP.2002) ..... 3

TEXAS CODE OF CRIMINAL PROCEDURE ART. 38.43 ..... 7

TEXAS CODE OF CRIMINAL PROCEDURE ART. 64.01 - 64.04 ..... 8

**OTHER AUTHORITIES**

1 BLACKSTONE, *Commentaries* ..... 14

3 BLACKSTONE, *Commentaries* ..... 14

JAMES DEWITT ANDREWS, AMERICAN LAW: A COMMENTARY ON THE JURISPRUDENCE, CONSTITUTION AND LAWS OF THE UNITED STATES, 590 (2D ED 1908). ..... 14

Petitioner, **PAUL CHRISTOPHER PENLEY,** respectfully requests that a writ of *certiorari* be issued to review the Judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the United States District Court for the Eastern District of Texas, Sherman Division.

## OPINIONS BELOW

The Court of Appeals affirmed (App. 1a) the Judgment (App. 4a) of the United States District Court for the Eastern District of Texas, Sherman Division, on April 12, 2006. No rehearing was requested.

## JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

## RELEVANT PROVISIONS INVOLVED (see appendix)

## STATEMENT

This case involves a damage action under 42 U.S.C. §§ 1983 & 1985, for the alleged intentional destruction of potentially exculpatory blood evidence by State officials, acting individually, and in concert with each other, in bad faith, and in contravention of a Texas state statute,[1] which imposes an undifferentiated and absolute duty to retain and to preserve evidence that "at the time of conviction was known to contain

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[1] Art. 38.39, Texas Code of Criminal Procedure, Preservation of Evidence Containing Biological Material [now renumbered as art. 38.43, Texas Code of Criminal Procedure].

biological material that if subjected to scientific testing would more likely than not (A) establish the identity of the person committing the offense; or (B) exclude a person from the group of persons who could have committed the offense. *See Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 337, 102 L. Ed. 2d 281 (1988). This case also involves allegations of deprivations of Petitioner's civil and constitutional rights under the United States Constitution to due process of law by the Respondents individually, jointly and severally, and in combination and conspiracy with each other, and acting under color of statutes, ordinances, regulations, customs and usages, of the State of Texas; and that the Respondents entered into a combination with each other consisting of two or more persons to accomplish the unlawful purpose of violating the Petitioner's right to due process of law and equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution; and thereby subjecting, and causing to be subjected, Petitioner, a citizen of the United States, to the deprivation of his rights, privileges and immunities secured by the Constitution and laws of the United States and of the State of Texas, damages for which Petitioner sued the Respondents under 42 U.S.C. §§ 1983 & 1985. *Id.*

**Petitioner's Conviction.**

Petitioner was charged by a Texas state court indictment with the offense of intoxication manslaughter alleged to have occurred in Collin County, Texas, on October 2, 1995. The critical evidence to demonstrate intoxication was blood evidence submitted by the State to support its contention that Petitioner had a blood/alcohol

concentration of at least 10% at the time of the accident that resulted in the death of an individual. A first trial in 1997 ended in a mistrial. A second jury convicted Petitioner in 1998, and the punishment was assessed by the same jury at 14 years' confinement in the Texas Department of Criminal Justice, Institutional Division, and a $10,000 fine. Petitioner exhausted all of his direct appeals, including a Petition for a Writ of *Certiorari* to this Court, which was denied.

Petitioner is now serving his sentence in the Texas Department of Criminal Justice, Institutional Division, incarcerated at the Daniels Unit in Snyder, Texas.

**Petitioner's Post-Conviction**
**Request for DNA Testing.**

In 2001, the Texas Legislature enacted Chapter 64 of the Texas Code of Criminal Procedure,[2] which prescribes when and how a convicted person may obtain post-conviction DNA testing. Chapter 64 became effective on April 5, 2001. Article 38.39, Texas Code of Criminal Procedure[3] also became effective April 5, 2001. *See* Act of April 3, 2001, 77th Leg., R.S., ch. 2, § 6, 2001 Tex. Gen. Laws 2, 5.

On or about August 24, 2001, Petitioner, through counsel, and pursuant to Chapter 64 of the Texas Code of Criminal Procedure, filed a sworn "Motion for Post Conviction DNA Testing on Blood Exhibit" in the 380th

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[2] *See* Tex.Code Crim. Proc. arts. 64.01-64.05 (Vernon Supp.2002).

[3] Renumbered from Vernon's Ann.C.C.P. art. 38.39 by Acts 2005, 79th Leg., ch. 728, § 23.001(8), eff. Sept. 1, 2005.

Judicial District Court of Collin County, Texas. On October 30, 2001, Petitioner requested that a hearing be set on the Motion for Post Conviction DNA Testing on Blood Exhibit. Respondent Sandovall set the Motion for Post Conviction DNA Testing on Blood Exhibit for a hearing before the Court for March 20, 2002.

On or about January 23, 2002, Respondent Sandovall, knowing that a Motion for Post Conviction DNA Testing on Blood Exhibit was pending before his Court, signed and entered an "Order To Dispose of Trial Exhibits", purportedly pursuant to Article 2.21, Texas Code of Criminal Procedure, permitting destruction of the evidence in this case, including the biological blood evidence the subject of Petitioner's DNA motion. On March 20, 2002, the State of Texas, by and through Assistant District Attorney John A. Stride, represented to the 380th District Court of Collin County, Texas, that "on or about January 23, 2002, the trial court entered an order permitting the destruction of the evidence in this case." On March 20, 2002, the date of the hearing on Petitioner's motion, the State of Texas, by and through Assistant District Attorney John A. Stride, represented to the 380th District Court of Collin County, Texas, that "The official court reporter of this Court, Lisa Renfro, discarded this evidence on March 5, 2002."[4] On March 20, 2202, the State of Texas, by and through Assistant District Attorney John A. Stride, represented to the 380th District Court of Collin County, Texas, in the above-referenced matter, that "since this evidence is no longer available, the State cannot deliver the requested blood

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[4]While the DNA Motion was pending and set for hearing before the Court.

sample to the Court." Initially, Petitioner, through other counsel, was led to believe that the blood evidence in this case was intentionally destroyed by Respondent Renfro on March 5, 2002, and Petitioner learned of the supposed destruction of the evidence on or about March 20, 2002.

On or about October 4, 2002, Petitioner, through counsel, sent a letter to Respondent Renfro inquiring about the supposed destruction of the blood evidence. After October 4, 2002, Respondent Renfro stated that the blood evidence was not destroyed until sometime in May, 2002, after the March 20, 2002, hearing date.

**Petitioner's § 1983 Action**

After Petitioner filed his First Amended Complaint, all Respondents filed Rule 12 motions to dismiss, and Petitioner filed responses thereto. The United States Magistrate Judge issued his Report and Recommendations (App. 8a), which concluded, *sua sponte*, that Petitioner lacked constitutional standing to bring the suit, and recommended dismissal on this basis. The Magistrate then went on to recommend adjudication of the merits of the case, even though he found that the Court lacked jurisdiction and recommended dismissal on the standing issue. Petitioner filed objections to the Findings and Recommendations. The district court adopted the Magistrate's Findings and Recommendations, granted the Respondents' motions to dismiss, and dismissed this case with prejudice. (App. 1a). Petitioner timely filed his Notice of Appeal.

## The Court of Appeals' Decision

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court holding that this case was governed by *Heck v. Humphrey* (App. 1a). The Court of Appeals held:

> *Heck* bars all of Penley's claims. To the extent that the district court were to award Penley damages on his claim regarding the destruction of evidence and the loss of the opportunity for DNA testing, the validity of his conviction ***would be implicitly questioned.*** Under *Heck*, Penley's claim is not actionable because he has not shown that his conviction has been reversed on direct appeal, expunged by executive order, invalidated by other state means, or called into question by the issuance of a federal habeas writ.[FN3] [FN3. *Heck*, 512 U.S. at 486-87, 114 S.Ct. 2364] [Emphasis added].

## REASONS FOR GRANTING THE PETITION

There are special and important reasons for granting the writ of *certiorari* in this case. Because many states have now enacted legislation for the preservation of biological DNA evidence used at criminal trials, and post-conviction DNA testing [*See* App. 23a], the questions presented herein are significant for the bench and bar of the United States and the various States, in the area of post-conviction habeas corpus relief and suits for damages under 42 U.S.C. § 1983. The questions presented are likely to recur in the various States and in the Courts of the United States.

Petitioners' Questions should be reviewed by this Court because the procedural history of this case, both in the Texas State courts and the federal courts, presents important questions of federal law which have not been, but should be, addressed and settled by this Court, i.e. whether a suit for damages under 42 U.S.C. § 1983, for alleged intentional, bad faith destruction of DNA evidence, precluding post-conviction DNA testing under Texas State law, "*necessarily implies*" that the Petitioner's conviction was unlawful, under this Court's holding in *Heck v. Humphrey*, 512 U.S. 477 (1994)?

Petitioners' Questions should be reviewed by this Court because the United States Court of Appeals for the Fifth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. *See, e.g., Hill v. McDonough*, 546 U.S. ___, 126 S.Ct. 2096 (decided June 12, 2006); *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004); *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994); *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). *See* Rule 10(1)(c), Supreme Court Rules.

Most state legislatures have now provided for some form of post-conviction vehicle to allow DNA testing of biological evidence. (See App. 23a – Post Conviction DNA Motions, National Conference of State Legislatures, November 2003). Likewise, States have enacted legislation that requires preservation of biological evidence utilized for conviction for lengths of time past the fact of conviction. *Id.* Texas has enacted such legislation. *See* Texas Code of Criminal Procedure Art. 38.43, Preservation of Evidence Containing Biological Material [formerly art. 38.29, CCP]. (Added

by Acts 2001, 77th Leg., ch. 2, § 1, eff. April 5, 2001. Renumbered from Vernon's Ann.C.C.P. art. 38.39 by Acts 2005, 79th Leg., ch. 728, § 23.001(8), eff. Sept. 1, 2005.). However, Texas has neglected to provide for any remedy when the State destroys such evidence, allegedly in bad faith, especially when a proper motion for post-conviction DNA testing is pending before a Texas state court. *See* Texas Code of Criminal Procedure Art. 64.01 – 64.04. *See also, e.g. Watson v. State*, 96 S.W.3d 497, 500 (Tex.App.-Amarillo 2002, pet. ref. 2003).

Some remedy for injurious violations of the Constitution must be made available if constitutional rights are to be preserved and given any meaningful existence. The failure to provide any remedy for the due process violations alleged by Penley would offend longstanding traditions of justice and raise grave constitutional questions. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). It is also radically at odds with the fundamental tenet of the Anglo-American legal tradition expressed in the maxim *ubi jus, ubi remedium* -- where there's a right there's a remedy -- a maxim classically viewed as central to the rule of law. Chief Justice Marshall in *Marbury v. Madison* quoted Blackstone for the proposition that " 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded,' " *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); and the Chief Justice added that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.*

Petitioner claims there is a damage remedy for such bad faith destruction of evidence under 42 U.S.C. § 1983, which does not *"necessarily impl[y]"* that the Petitioner's conviction was unlawful, under this Court's holding in *Heck v. Humphrey*, 512 U.S. 477 (1994). Because the evidence is destroyed, it cannot be tested for potentially exculpatory DNA evi`ence. The damage and harm has been done, and Petitioner is forever precluded from obtaining information from such evidence that may have allowed a collateral attack on his manslaughter conviction.

Section 1983 authorizes a "suit in equity, or other proper proceeding for redress" against any person who, under color of state law, "subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution." Petitioner's complaint states such a claim. Despite its literal applicability, however, § 1983 must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence. *See Preiser v. Rodriguez*, 411 U.S. 475, 489, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). Such claims fall within the "core" of habeas corpus and are thus not cognizable when brought pursuant to § 1983. *Ibid.* By contrast, constitutional claims that merely challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside of that core and may be brought pursuant to § 1983 in the first instance. See *Muhammad v. Close*, 540 U.S. 749, 750, 124 S.Ct. 1303, 1304, 158 L.Ed.2d 32 (2004) *(per curiam)*; *Preiser, supra*, at 498-499, 93 S.Ct. 1827. *See also Nelson v.*

*Campbell*, 541 U.S. 637, 643, 124 S.Ct. 2117, 2122, 158 L.Ed.2d 924 (2004).

Some cases are hybrids, with a prisoner seeking relief unavailable in habeas, notably damages, but on allegations that not only support a claim for recompense, but imply the invalidity either of an underlying conviction or of a particular ground for denying release short of serving the maximum term of confinement. In *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), this Court held that where success in a prisoner's § 1983 damages action would implicitly question the validity of conviction or duration of sentence, the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence. Accordingly, in *Edwards v. Balisok*, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997), the Court applied *Heck* in the circumstances of a § 1983 action claiming damages and equitable relief for a procedural defect in a prison's administrative process, where the administrative action taken against the plaintiff could affect credits toward release based on good-time served. In each instance, conditioning the right to bring a § 1983 action on a favorable result in state litigation or federal habeas served the practical objective of preserving limitations on the availability of habeas remedies. Federal petitions for habeas corpus may be granted only after other avenues of relief have been exhausted. 28 U.S.C. § 2254(b)(1)(A). See *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). Prisoners suing under § 1983, in contrast, generally face a substantially lower gate, even with the requirement of the Prison Litigation Reform Act of 1995 that administrative opportunities be exhausted

first. 42 U.S.C. § 1997e(a).

*Heck*'s requirement to resort to state litigation and federal habeas before § 1983 is not, however, implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence. *Muhammad v. Close*, 540 U.S. 749, 751, 124 S.Ct. 1303, 1305, 158 L.Ed.2d 32 (2004) *(per curiam)*. The Court's parameters of the *Heck* holding have not been squarely drawn. The Court's guiding rule, however, is that:

> "Although damages are not an available habeas remedy, we have previously concluded that a § 1983 suit for damages that would ***'necessarily imply'*** the invalidity of the fact of an inmate's conviction, or ***'necessarily imply'*** the invalidity of the length of an inmate's sentence, is not cognizable under § 1983 unless and until the inmate obtains favorable termination of a state, or federal habeas, challenge to his conviction or sentence. *Heck v. Humphrey*, 512 U.S. 477, 487, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994); *Edwards v. Balisok*, 520 U.S. 641, 648, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997)." [Emphasis added].

*See Nelson v. Campbell*, 541 U.S. 637, 646, 124 S.Ct. 2117, 2124, 158 L.Ed.2d 924 (2004).

This "favorable termination" requirement is necessary to prevent inmates from doing indirectly, through damages actions, what they could not do directly by seeking injunctive relief: challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas

statute. *Muhammad*, 540 U.S., at 751, 124 S.Ct., at 1304. Even so, the Court was careful in *Heck* to stress the importance of the term ***"necessarily."*** For instance, the Court acknowledged that an inmate could bring a challenge to the lawfulness of a search pursuant to § 1983 in the first instance, even if the search revealed evidence used to convict the inmate at trial, because success on the merits would not "*necessarily* imply that the plaintiff's conviction was unlawful." *Heck*, 512 U.S., at 487, n. 7, 114 S.Ct. 2364 (noting doctrines such as inevitable discovery, independent source, and harmless error). To hold otherwise would have cut off potentially valid damages actions as to which a plaintiff might never obtain favorable termination -- suits that could otherwise have gone forward had the plaintiff not been convicted. *Nelson v. Campbell*, 541 U.S. 637, 647, 124 S.Ct. 2117, 2124, 158 L.Ed.2d 924 (2004).

Recently, in *Hill v. McDonough*, 546 U.S. ___, 126 S.Ct. 2096 (decided June 12, 2006), the Court once again found it necessary to discuss which of the two statutes governs an action brought by a prisoner alleging a constitutional violation. The Court held that Hill's § 1983 action was controlled by the holding in *Nelson*. Hill's action, if successful, would not necessarily prevent the State from executing him by lethal injection. The complaint in Hill did not challenge the lethal injection sentence as a general matter, but sought instead only to enjoin the respondents "from executing [Hill] in the manner they currently intend." *Hill* can be interpreted to further delineate the *Heck* bar to § 1983 suits, which seek to implicate the validity of a conviction or sentence. Thus, if Penley's damage action was successful, would the State of Texas be

precluded from continuing Penley's confinement under the conviction and sentence?[5] In this case, Penley has not prayed for such relief.

## CONCLUSION

Texas courts have held that there is no remedy for a violation of art. 38.43 [now 38.39]. *See Watson v. State*, 96 S.W.3d 497, 500 (Tex.App.-Amarillo 2002, pet. ref. 2003). *See also, Wyatt v. State*, 2005 WL 729960 (Tex.App.-Dallas)(Not designated for publication).[6]

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[5] The Court said:

> "This argument cannot be squared with *Nelson's* observation that its criterion-whether a grant of relief to the inmate would necessarily bar the execution-is consistent with *Heck's* and *Balisok's* approach to damages actions that implicate habeas relief. *Nelson, supra*, at 646-647, 124 S.Ct. 2117. In those cases the question is whether "the nature of the challenge to the procedures could be such as necessarily to imply the invalidity" of the confinement or sentence. *Balisok, supra*, at 645, 117 S.Ct. 1584. As discussed above, and at this stage of the litigation, the injunction Hill seeks would not necessarily foreclose the State from implementing the lethal injection sentence under present law, ***and thus it could not be said that the suit seeks to establish "unlawfulness [that] would render a conviction or sentence invalid."*** *Heck, supra*, at 486, 114 S.Ct. 2364. ***Any incidental delay caused by allowing Hill to file suit does not cast on his sentence the kind of negative legal implication that would require him to proceed in a habeas action."*** [Emphasis added].

*Hill*, 126 S.Ct. 2103-2104.

[6] *See* TRAP RULE 47.2 for designation and signing of opinions.

Nevertheless, based upon the unique facts of this case, Penley argues *Ubi jus, ibi remedium.*[7]

Blackstone described an act that deprives a person of a right as a "wrong." 3 Blackstone, *Commentaries* *116. Wrongs can be public (crimes and misdemeanors) or private (civil injuries). *Id.* Blackstone explained that the remedial part of the law provides a method for recovering for deprivations of rights or for redressing wrongs, be they public or private. 1 Blackstone, *Commentaries* *54. Whenever the common law recognized a right or prohibited an injury, he wrote, it also gave a remedy by legal action initiated by filing the appropriate writ. 3 Blackstone, *Commentaries* *123.

Blackstone echoed Coke in stating that it would be "in vain" for the law to recognize rights, if it were not for the remedial part of the law that provides the methods for restoring those rights when they wrongfully are withheld or invaded. 1 Blackstone, *Commentaries* *56. To Blackstone, the guarantee of legal remedy for injury "is what we mean properly, when we speak of the protection of the law." *Id.* Hence, the maxim of English law, *Ubi jus, ibi remedium*: "for every right, there must be a remedy." James DeWitt Andrews, *American Law: A Commentary on the Jurisprudence, Constitution and laws of the United States*, 590 (2d ed 1908).

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[7] Petitioner asserts that when a State grants a right to a citizen, albeit not a constitutional right, when the State fails to provide a remedy for enforcement or vindication of such right, a constitutional due process violation also occurs, particularly in the area of standing.

To invoke federal jurisdiction, a plaintiff is required to allege facts demonstrating that he has suffered an injury-in-fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Gore, Inc. v. Espy*, 87 F.3d 767, 771 (5th Cir.1996). Here, the Plaintiff has asserted a "personal stake" in the dispute that is concrete and particularized. *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). As alleged, the conduct of the Respondents in destroying potentially exculpatory evidence in their possession and control, in bad faith, constitutes a concrete and particularized injury, not conjectural, since the evidence is gone, never to be allowed for DNA testing as envisioned by the Texas State statutes authorizing the same. The Respondents, in the conduct described in Plaintiff's Complaint, have affected the Petitioner in a personal, individual and particularized way because, as he has alleged, where potentially exculpatory evidence is destroyed in bad faith there is a due process violation, and he has a personal stake in vindicating this due process violation under § 1983. *Id.*

For these various reasons, this petition for certiorari should be granted. Petitioner prays that the Petition for Writ of *Certiorari* be granted and that upon full consideration the Court reverse the decision of the United States Court of Appeals for the Fifth Circuit, and remand the case to the Court of Appeals with instructions.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 05-40565.
United States Court of Appeals,Fifth Circuit.

Paul Christopher PENLEY, Plaintiff-Appellant,
v.
COLLIN COUNTY, TEXAS; Charles Sandoval, Judge of the 380th District Court of Collin County, Texas; Tom O'Connell; Lisa Renfro, Court Reporter of the 380th District Court; John Roach, District Attorney of Collin County, Texas, Defendants-Appellees.

April 12, 2006.

James M. Murphy, Dallas, TX, for Penley.

Seth Byron Dennis, Asst. Atty. Gen., Austin, TX, for Collin Cty., TX, Sandoval and O'Connell.

Robert Jacob Davis, Matthews, Carlton, Stein, Shiels, Pearce, Dunn & Knott, Dallas, TX, for Renfro and Roach.

Appeal from the United States District Court for the Eastern District of Texas.

Before GARWOOD, HIGGINBOTHAM and CLEMENT, Circuit Judges.

PER CURIAM:

Paul Christopher Penley, currently serving a fourteen-year prison sentence for involuntary

manslaughter, appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint against several officials of Collin County, Texas. Penley claims that evidence of his crime was destroyed, which prevents him from availing himself of the opportunity for DNA testing provided by Texas law. We review the district court's dismissal de novo, applying the *573 same standard used for Federal Rule of Civil Procedure 12(b)(6) dismissals.FN1

Penley seeks compensatory damages in the amount of $ 2 million for the alleged improper destruction of blood evidence that was used to convict him of involuntary manslaughter. The district court dismissed Penley's claims on several grounds: lack of standing, judicial immunity (as applied to Charles Sandoval, Judge of the 380th District Court of Collin County, Texas), absolute immunity (as applied to John Roach, current district attorney of Collin County, Texas, and Tom O'Connell, former district attorney of Collin County, Texas), qualified immunity (as applied to Lisa Renfro, court reporter of the 380th District Court of Collin County, Texas), and Heck v. Humphrey.FN2

Heck bars all of Penley's claims. To the extent that the district court were to award Penley damages on his claim regarding the destruction of evidence and the loss of the opportunity for DNA testing, the validity of his conviction would be implicitly questioned. Under Heck, Penley's claim is not actionable because he has not shown that his conviction has been reversed on direct appeal, expunged by executive order, invalidated by other state means, or called into question by the issuance

of a federal habeas writ.FN3 Accordingly, the district court's dismissal of Penley's § 1983 claims is AFFIRMED.

Footnotes

FN1. See Hart v. Hairston, 343 F.3d 762, 763-64 (5th Cir.2003).

FN2. 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).

FN3. Heck, 512 U.S. at 486-87, 114 S.Ct. 2364.

No. Civ.A. 4:04CV24.

United States District Court,E.D. Texas,
Sherman Division.

Paul Christopher PENLEY

v.

Charles SANDOVAL, et al.

March 8, 2005.

James M. Murphy, Dallas, TX, for Paul Christopher Penley.

Seth Byron Dennis, Attorney General's Office, Austin, TX, Robert Jacob Davis, Matthews Carlton Stein Shiels Pearce & Knott, Dallas, TX, for Charles Sandoval, et al.

*MEMORANDUM ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION*

SCHELL, J.

Plaintiff Paul Christopher Penley, an inmate at the Daniel Unit, represented by counsel, brought this civil rights suit pursuant to 42 U.S.C. § 1983 against Charles Sandoval, Tom O'Connell, Lisa Renfro, and John Roach.

*1 The Court referred this matter to the Honorable Don D. Bush, United States Magistrate Judge, at

Sherman, Texas, for consideration pursuant to applicable laws and orders of this court. The Magistrate Judge determined that plaintiff's claims are frivolous and fail to state a claim upon which relief may be granted. Additionally, the Magistrate Judge determined that the defendants' motions to dismiss were meritorious and should be granted. The Magistrate Judge recommends that the Defendants' motions to dismiss should be granted and the complaint dismissed.

The court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such referral, along with the record, pleadings and all available evidence. No objections to the Report and Recommendation of United States Magistrate Judge were timely filed by the parties.

It is noted that plaintiff mailed objections in the United States mail which were filed on March 2, 2005.[EN1] However, plaintiff's objections were untimely. Under Fed. R. Civ. P. 72, within 10 days after being served with a copy of the recommended disposition of a matter, a party may serve and file specific, written objections to the proposed findings and recommendations. Rules 5 and 6 of the Federal Rules of Civil Procedure define "service."

In his objections, plaintiff asserts he did not receive the report and recommendation until February 14, 2005. Rule 5(b) states that service is made by mailing a copy to the attorney or party at the attorney's or party's last known address. Service by mail, for purposes of Rule 5, is complete upon mailing. Fed. R. Civ. P. 5(b)(2)(B). Therefore, plaintiff's assertion that he did not receive

the report until February 14, 2005 is not relevant for purposes of calculating the deadline for filing objections.[FN2]

Rule 6 modifies both Rule 5 and Rule 72. First, Rule 6(a) states that "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Because Rule 72 permits only 10 days for objections to a magistrate's recommendation, Rule 6 excludes Saturdays, Sundays, and legal holidays from that 10 day period. Further, Rule 6(e) states that whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period. Thus, because the magistrate's recommendation was served on plaintiff by mail, the period for his response must be enlarged by 3 days.

The report and recommendation was entered on the docket and mailed to plaintiff on February 9, 2005. Therefore, excluding weekends and holidays, plaintiff's objections were due on or before February 25, 2005. Adding three days pursuant to Rule 6(e) since the report was served by mail, plaintiff's objections were due on or before February 28, 2005.

*2 Plaintiff's objections were received by the Clerk in the United States mail on March 2, 2005. Accordingly, plaintiff's objections were untimely. Thus, plaintiff is not entitled to *de novo* review of the objections in relation to the pleadings and the applicable law. *See* *Douglass v. United States Services Automobile*

*Association*, 79 F.3d 1415, 1417 (5th Cir.1996) (en banc); 28 U.S.C. § 636(b)(1); and Fed. R. Civ. P. 72(b).

Even considering plaintiff's objections and affording plaintiff *de novo* review, the court, after careful consideration, concludes plaintiff's objections are without merit and are overruled.

*ORDER*

Accordingly, the findings of fact and conclusions of law of the Magistrate Judge are correct and the report of the Magistrate Judge is ADOPTED. It is therefore

ORDERED that the Defendants' motions to dismiss are GRANTED. A final judgment will be entered in this case in accordance with the Magistrate Judge's recommendations.

SIGNED this 7th day of *March*, 2005.

Footnotes

FN1. Pursuant to Local Rule CV-5, all documents filed with the court shall be electronically filed, except in limited circumstances. Counsel for plaintiff was specifically notified of the rule concerning electronic filing on February 9, 2005. Counsel, however, has neither complied with the local rule nor shown good cause for failing to do so. In accordance with General Order 03-12, plaintiff's objections should not have been filed since they were submitted after September 1, 2004, were not filed electronically, and were not permitted by the local rules.

FN2. While counsel asserts he did not receive the report until February 14, 2005, the certified mail return receipt indicates otherwise. The receipt was signed by Patti Murphy as agent for James M. Murphy, Esq. While Mrs. Murphy failed to complete the date of delivery section, the return receipt was filed with the court on February 11, 2005, indicating it was received by Mrs. Murphy on or before February 11, 2005.

*REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE*

BUSH, Magistrate J.

Plaintiff Paul Christopher Penley, an inmate confined in the Daniel Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, brings this civil rights action pursuant to 42 U.S.C. § 1983 against Charles Sandoval, Judge of the 380th District Court of Collin County, Texas; Tom O'Connell, the former District Attorney of Collin County, Texas; Lisa Renfro, Official Court Reporter of the 380th District Court of Collin County, Texas; and John Roach, District Attorney of Collin County, Texas.

The above-styled action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

*Factual Background*

Following an automobile accident on October 2, 1995, Plaintiff was taken to a nearby hospital where a nurse drew a blood sample. *Penley v. State*, 2 S.W.3d 534 (Tex.App.-Texarkana Aug.23, 1999). The blood sample was tested and the results showed Plaintiff was legally intoxicated at the time of the blood draw. *Id.*

On February 2, 1998, Plaintiff was convicted in the 380th Judicial District Court of Collin County, Texas for the criminal offense of intoxication manslaughter arising from the October 2, 1995 accident. Plaintiff was sentenced to a term of fourteen years in the Texas Department of Criminal Justice.

Plaintiff appealed his conviction to the Sixth District Court of Appeals in Texarkana. The judgment of the trial court was affirmed. *Penley*, 2 S.W.3d 534. Plaintiff's petition for discretionary review was denied by the Texas Court of Criminal Appeals on January 12, 2000. Plaintiff's petition for writ of certiorari was denied by the United States Supreme Court on June 19, 2000. *Penley v. Texas*, 530 U.S. 1243, 120 S.Ct. 2689, 147 L.Ed.2d 961 (2000).

*3 Plaintiff alleges that on or about August 24, 2001, Plaintiff, through counsel, filed a "Motion for Post Conviction DNA Testing of Blood Exhibit" in the 380th Judicial District Court of Collin County, Texas. Plaintiff states that defendant Sandoval subsequently set the Motion for Post Conviction DNA Testing on Blood Exhibit for a hearing before the court on March 20, 2002. However, plaintiff alleges that on or about January 23, 2002, defendant Sandoval signed an "Order To Dispose of Trial Exhibits" permitting the destruction of the evidence in plaintiff's case, including

the biological blood evidence which was the subject of Plaintiff's DNA motion. The blood evidence was subsequently destroyed by defendant Renfro, the official Court Reporter of the state court.

Plaintiff alleges that under the circumstances and history of the case, Plaintiff was entitled to submit such evidence to scientific testing under current Texas law, and the blood evidence which has now been destroyed, constituted potentially exculpatory evidence under the holding of *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

*Motions to Dismiss*

Defendants Sandoval, O'Connell and Roach filed a motion to dismiss and for judgment on the pleading pursuant to Rule 12(b)(6) and Rule 12(c) (docket entry no. 7). The Defendants assert they are entitled to absolute immunity and Plaintiff's claim for monetary damages is barred.

Defendant Renfro also has filed a motion to dismiss (docket entry no. 13). Defendant Renfro asserts Plaintiff's action should be dismissed for failure to state a claim upon which relief can be granted. Defendant Renfro contends she is entitled to judicial immunity and qualified immunity from Plaintiff's claims. Defendant Renfro also contends Plaintiff's claims are barred by the doctrine of *Heck v. Humphrey* since Plaintiff's criminal conviction has not been reversed or otherwise rendered invalid. Further, Defendant Renfro asserts that "Plaintiff and counsel should be sanctioned for the filing of what is a clearly frivolous lawsuit."

*Standard of Review*

Pursuant to 28 U.S.C. § 1915A, the court shall review, as soon as practicable, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief.

The Supreme Court has considered when a complaint is frivolous. In *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989), the Supreme Court held "a complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or fact." The Court went on to say that a claim is legally frivolous under Section 1915(d) when it is based on "an indisputably meritless legal theory." *Id.* at 327.

*4 A complaint may be dismissed for failure to state a claim if it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). In considering whether to dismiss a complaint for failing to state a claim upon which relief may be granted, all factual allegations in the complaint must be taken as true and construed favorably to the plaintiff. *Fernandez-Montez v. Allied Pilots Association*, 987 F.2d 278 (5th Cir.1993).

*Analysis*

*Elements of a Cause of Action Under 42 U.S.C. § 1983*

Title 42 U.S.C. § 1983 creates a cause of action against any person who, acting under color of state law, causes another to be deprived of a federally protected constitutional right. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980); *Phillips v. Monroe County*, 311 F.3d 369, 373 (5th Cir.2002), *cert. denied* 539 U.S. 914, 123 S.Ct. 2274, 156 L.Ed.2d 130 (2003). Section 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state ... subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress....

42 U.S.C. § 1983.

The misuse of power, possessed by virtue of state law and made possible only because the official is clothed with the authority of state law, is action under color of state law. *Townsend v. Moya*, 291 F.3d 859, 861 (5th Cir.2002). A defendant acts under color of state law if he misuses or abuses his official power and if there is a nexus between the victim, the improper conduct, and the defendant's performance of official duties. *Id.* If, however, a state officer pursues personal objectives without using or misusing the power granted to him by

the state to achieve the personal aim, then he is not acting under color of state law. *Harris v. Rhodes*, 94 F.3d 196, 197 (5th Cir.1996).

Two allegations are required in order to state a cause of action under 42 U.S.C. § 1983. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. *Gomez*, 446 U.S. at 640; *Green v. State Bar of Texas*, 27 F.3d 1083, 1087 (5th Cir.1994).

*Standing*

Prior to considering the merits of a plaintiff's claim, a federal court should determine whether the plaintiff has standing to prosecute his claim. The jurisdiction of a federal court may only be invoked when a plaintiff has suffered some threatened or actual injury as a result of a putatively illegal action. The judicial powers given to federal courts under Article III of the United States Constitution exist only to redress or otherwise protect against injury to a complaining party. *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). In order to have standing to being his claim in a federal court, a plaintiff must allege actual or threatened "injury, in fact, economic or otherwise." *Association of Data Processing Orgs. v. Camp*, 397 U.S. 150, 152, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

*5 "Standing defies precise definition, but at the least insists that the complained of injury be real and immediate rather than conjectural, that the injury be traceable to the defendant's allegedly unlawful conduct, and that relief from the injury must be likely to follow

from a favorable ruling." *Society of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1285 (5th Cir.)(*en banc* ), *cert. denied*, 506 U.S. 866, 113 S.Ct. 191, 121 L.Ed.2d 135 (1992).

Plaintiff has not alleged that he has suffered any injury as the result of the alleged acts which form the basis of this complaint. Plaintiff complains of the destruction of "potentially exculpatory" evidence. Plaintiff alleges only that "had the evidence been preserved, it could have been subjected to DNA testing to determine whether the blood that had been allegedly previously tested by the Texas Department of Public Safety lab was in fact Plaintiff's blood, and if not, Plaintiff's conviction was wrongful and illegal under the federal constitution." Plaintiff's *First Amended Complaint*, at page 19. Because plaintiff has not alleged any more than conjectural personal injury relating to his claims he has no constitutional standing to bring these claims. *Allandale Neighborhood Ass'n v. Austin Transp. Study Policy Advisory Comm.*, 840 F.2d 258, 261-62 (5th Cir.1988). As a result, plaintiff's claims lack any arguable basis in law or fact and should be dismissed as frivolous.

*Due Process*

Here, plaintiff claims that blood evidence used to convict him was improperly destroyed following his trial. Plaintiff asserts that, as a result of the destruction of evidence, he was denied due process in violation of the United States Supreme Court's holding in *Arizona v. Youngblood.*

In *Arizona v. Youngblood*, the Supreme Court held that

the negligent destruction of evidence that might have been helpful to a criminal defendant does not violate due process. 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281. Only when law enforcement officials act in bad faith to destroy evidence is the failure to preserve potentially useful evidence a possible due process violation. *See also California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) (Due Process Clause does not require the preservation of defendant's breath sample).

In *Youngblood*, a defendant argued post-conviction that the police's failure to preserve physical evidence violated his Due Process rights under the Fourteenth Amendment. 488 U.S. at 52, 109 S.Ct. 333, 102 L.Ed.2d 281. Youngblood argued that the police's failure to refrigerate the victim's clothing, and to have a physician examine samples close to the time the samples were taken, denied him evidence material to his defense. *See id.* at 54, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281.

Here, however, as the defendants assert, plaintiff was provided access to the blood evidence at the time of his trial. Plaintiff was denied no evidence material to his defense at trial. The blood evidence was destroyed only after plaintiff's conviction and conclusion of plaintiff's appeal of his conviction to the United States Supreme Court. Thus, plaintiff has failed to allege a constitutional violation.[FN1] Additionally, for the reasons set forth below, the defendants' motions to dismiss should be granted.

*Immunity*

*6 Defendant Sandoval is an elected State District Judge, currently presiding over the 380th District Court of Collin County, Texas. Defendants O'Connell and Roach are, respectively, the former and current Criminal District Attorneys of Collin County, Texas. Defendant Renfro is the official Court Report of the 380th District Court.

Judges enjoy absolute judicial immunity for judicial acts performed in judicial proceedings. *Mays v. Sudderth*, 97 F.3d 107, 110-11 (5th Cir.1996). Judicial officers are entitled to absolute immunity from damages in § 1983 actions arising out of acts performed in the exercise of their judicial functions. *Graves v. Hampton*, 1 F.3d 315, 317 (5th Cir.1993).

Absolute judicial immunity extends to all judicial acts that are not performed in the clear absence of all jurisdiction. Thus, a judge has no immunity (1) for actions taken outside of his judicial capacity, or (2) for actions that are judicial in nature by occur in the complete absence of all jurisdiction.

*Molina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir.1993) (citations omitted).

Except in the clear absence of jurisdiction, "[a] judge will not be deprived of immunity because the action took was in error, was done maliciously, or was in excess of his authority." *Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). "[T]he scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge." *Id.* at 356.

Plaintiff's allegations against defendant Sandoval arise out of acts performed in the exercise of his judicial functions by signing and entering an "Order To Dispose of Trial Exhibits" which is within the scope of his jurisdiction, thus, affording him absolute judicial immunity. Accordingly, plaintiff can prove no set of facts in support of his claims which would entitle him to relief.

Further, prosecutors are absolutely immune from monetary liability for "initiating a prosecution and in presenting the State's case." *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). A prosecutor's absolute immunity extends to the handling of appeals and other post-conviction proceedings. *Henzel v. Gerstien*, 608 F.2d 654 (5th Cir.1979); *Stewart v. Deghroony*, 566 F.Supp. 1256, 1257 (E.D.Mo.1983). A prosecutor's immunity is not defeated by showing that the prosecutor acted wrongfully or even maliciously. *Imbler*, 424 U.S. at 427 n. 27. Thus, defendants O'Connell and Roach have immunity from plaintiff's claims.[EN2]

Plaintiff alleges defendant Renfro, the Court Reporter, destroyed potentially exculpatory evidence. Official court reporters are entitled to qualified immunity under 42 U.S.C. § 1983 if they acted pursuant to their lawful authority and following in good faith the instructions or rules of the Court. *See Rheuark v. Shaw*, 628 F.2d 297, 305 (5th Cir.1980).

Plaintiff has made no more than a conclusory allegation that defendant Renfro was acting in bad faith. However, conclusory allegations will not suffice to prevent dismissal for failure to state a claim.

*Fernandez-Montes*, 987 F.2d 278, 284. Defendant Renfro was acting pursuant to an "Order To Dispose of Trial Exhibits" signed and entered by defendant Sandoval on January 23, 2002. Accordingly, defendant Renfro is entitled to qualified immunity.

*7 Plaintiff's complaint seeks redress from defendants who are immune from such relief. Thus, the defendants' motion to dismiss should be granted. Further, plaintiff's claims are frivolous and fail to state a claim upon which relief may be granted.

*Unconstitutional Conviction*

To the extent plaintiff seeks compensatory damages for alleged illegal acts surrounding his conviction, plaintiff's claims lack merit. In order to recover damages for allegedly unconstitutional convictions or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a plaintiff in a suit brought pursuant to 42 U.S.C. § 1983 must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). A claim for damages based on a conviction or sentence that has not been so invalidated does not state a cause of action under Section 1983. The principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to Section 1983 actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement. *Id.* at

486.

As a result, when a state prisoner seeks damages in a Section 1983 suit, the court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of the conviction or sentence. If it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. *Id.* Even a prisoner who has fully exhausted available state remedies has no cause of action under Section 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus. *Id.* at 489. If, however, the court determines that the plaintiff's action, even if successful, would not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of any other bar to the suit. *Id.* at 487.

If a court determines that an action brought under Section 1983 must be dismissed because a judgment in favor of the plaintiff would necessarily imply the invalidity of a conviction or sentence that has not been reversed expunged, invalidated, or impugned by the grant of a writ of habeas corpus, it is not necessary to toll the statute of limitations on the plaintiff's claim while state challenges to the conviction or sentence are being exhausted. *Id.* at 489. Tolling the statute of limitations is unnecessary because a Section 1983 action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated. *Id.* at 489-90.

*8 Here, plaintiff seeks monetary damages for alleged unlawful acts which led to the destruction of potentially exculpatory blood evidence. If the blood was not exculpatory, plaintiff has alleged no injury. If the blood was exculpatory, a judgment in favor of the plaintiff would necessarily imply the invalidity of the conviction or sentence. Plaintiff has neither alleged nor demonstrated that his conviction has been overturned or otherwise invalidated. [EN3] Accordingly, the defendants' motion to dismiss should be granted. Thus, Plaintiff's claims must be dismissed without prejudice to Plaintiff's ability to pursue his claims through the pending petition for writ of habeas corpus.

*Recommendation*

The Defendants' motions to dismiss should be granted. Accordingly, Plaintiff's complaint should be dismissed.

*Objections*

Within ten (10) days after being served with a copy of the Magistrate Judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the Magistrate Judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court except on

grounds of plain error. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1417 (5th Cir.1996) (en banc); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72.

SIGNED this *3* day of *Feb*, 2005.

Footnotes

FN1. Plaintiff also asserts that he was denied equal protection by the acts of the defendants. However, plaintiff has asserted no factual basis for his claims. To prove a cause of action for violation of equal protection of the laws, a plaintiff must demonstrate that the defendants acted with a discriminatory purpose. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, n. 16, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984), *National Association of Government Employees v. City Public Service Board of San Antonio, Texas*, 40 F.3d (5th Cir.1994); *United States v. Galloway*, 951 F.2d 64 (5th Cir.1992). "Discriminatory purpose in an equal protection context implies that the decision maker selected a particular course of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group." *Galloway*, 951 F.2d at 65. Further, plaintiff bases his claims regarding biological material on Art. 38.39 and Chapter 64 of the Texas Code of Criminal Procedure. Article 38.39 provides no remedy, from a convicting court or otherwise, for the failure to preserve biological material. Unlike Chapter 64, there is no trial court proceeding under article 38.39 so there can be no judgment or order from which an appeal can be brought. The only final relief authorized by Chapter 64 is rendition of a finding on whether results of DNA

testing are favorable to the convicted person. Art. 64.04.

FN2. Plaintiff concedes that it is not clear without further development of the facts through discover, who was in the office of the district attorney at the time the blood evidence was actually destroyed.

FN3. Plaintiff's petition for writ of habeas corpus is pending in this court. *See Penley v. Dretke*, Civil Action No. 4:03cv301.

Post-Conviction DNA Motions
November 2003

Each state has its own set of procedural rules for post-conviction relief. These rules set the grounds upon which a new trial is available and the threshold that must be met in order to merit a new trial. In most states, the rules of criminal procedure require new evidence to be brought before the court within six months of the conviction. This potentially excludes offenders who were convicted before DNA testing was available but for whom such testing may now provide important evidence relevant to their case.

The potential for DNA to exonerate, as well as convict offenders has led to specific state statutes to allow for postconviction DNA testing under certain circumstances, even after the convicted person has exhausted all of his/her appeals. The motions allowed and the processes being created under these new laws allow judges broader authority to order or admit DNA evidence in such cases. To date, 31 states have laws in place to provide for motions for postconviction DNA testing.

The Illinois law passed in 1997 is typical of state laws that have followed in recent years since.

(725 ILCS 5/116-3) Sec. 116-3. Motion for fingerprint or forensic testing not available at trial regarding actual innocence.

a. A defendant may make a motion before the trial court that entered the judgment of conviction in

his or her case for the performance of fingerprint or forensic DNA testing on evidence that was secured in relation to the trial which resulted in his or her conviction, but which was not subject to the testing which is now requested because the technology for the testing was not available at the time of trial. Reasonable notice of the motion shall be served upon the State.

b. The defendant must present a prima facie case that: (1) identity was the issue in the trial which resulted in his or her conviction; and (2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

c. The trial court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination that: (1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion
of actual innocence; (2) the testing requested employs a scientific method generally accepted within the relevant scientific community. (Source: P.A. 90-141, effective 1-1-98.)

Other laws include:

New York

§440.30 Motion to vacate judgment and set aside sentence procedure.

Allows for the testing of DNA evidence in cases where the evidence was available but not tested.

Minnesota

§ 590.01 Sub d. 1a. Motion for fingerprint or forensic testing not available at trial.

Allows a person convicted of a crime to make a motion for the performance of fingerprint or forensic DNA testing to demonstrate the person's actual innocence if certain conditions are met.

Since the year 2000, many states have taken interest in updating post-conviction procedure to allow for DNA technology, and the following states have passed laws:

Arizona SB 1353 (2000)

A person who was convicted of and sentenced for a felony offense and who meets the requirements may request the forensic DNA testing of any evidence that is in the possession or control of the court or the state, that is related to the investigation or prosecution that resulted in the judgment of conviction, and that may contain biological evidence. Also requires the state, if a DNA test request is made, to preserve and create an inventory of evidence in the case.

California SB 1342 (2000)

Authorizes motion for post-conviction DNA testing upon demonstrated reasonable probability that the technology, had it been available at the time of trial resulting in conviction, would have had an impact on the verdict.

Colorado SB 164 (2003)

Allows an incarcerated person to file a motion for post-conviction DNA testing, where biological evidence in the case is available and not previously tested. Petitioner shall bears all costs of testing and is afforded the right to appeal the denial of the DNA request. States that no law enforcement duty to preserve or liability for failure to preserve such evidence is created as a result of this act. Provides that DNA profiles obtained as a result of post-conviction testing ordered are to be available to state and federal data bases.

Connecticut HB 5903 (2000)

Allows petitions based on DNA evidence that was not discoverable or available at the time of the original trial any time after the discovery or availability of such new evidence.

Delaware Senate Substitute for SB 329 (2000)

Allows overturning convictions if forensic DNA testing not available at the time of trial establishes the innocence of the convicted person. Also extends the statute of limitations on crimes when the prosecution is based upon forensic DNA testing.

Delaware SB 38 (2003)

Extends the data of termination for filing motions for post-conviction DNA testing.

Florida SB 366 (2001)

Allows any person convicted of a crime to petition for DNA testing of evidence collected during the investigation of the crime for which he is sentenced. Costs of testing paid for by petitioner unless deemed indigent. Petitioner has 30 days to appeal if relief is denied.

Georgia S 119 (2003)

Provides for motions for post-conviction DNA testing, where evidence exists that was not previously subjected to DNA testing. Requires victims be notified of a defendant's motion for a new trial. Requires 10-year preservation of criminal cases physical evidence; and in death penalty cases, maintenance of evidence until the sentence is carried out.

Idaho HB 242 (2001)

Allows any person convicted of a criminal offense to motion for post-conviction DNA testing if evidence used at trial and susceptible to testing is available and was subject to a clear chain of custody. Provides deadline for filing. Petitioner must pay for costs unless he qualifies for state assistance.

Indiana SB 81 (2001)

Provides for post-conviction DNA testing and analysis for persons convicted of Class A, B and C felonies

Kentucky HB 4 (2002)

Provides procedure for person convicted of a capital offense and sentenced to death to request DNA testing and analysis of existing forensic evidence not previously subjected to such analysis. Requires petitioner pay for cost of testing; for appointment of counsel for qualifying defendants; and for preservation of evidence in such cases. If results of testing are not favorable to defendant, the court may order that the defendant's DNA sample be added to the state police database, and provide notice to victim families. Expands to additional crimes those offenders currently in custody of or being supervised by the Department of Corrections required to submit a sample for DNA analysis; and prioritizing implementation as funding becomes available. Includes persons convicted unlawful transaction with minor, use of or promoting sexual performance of a minor; burglary I and II; and Class A and Class B felonies involving death or serious injury to victim. Includes some juvenile offenders.

Louisiana SB 511 (2001)

Provides procedure for filing post-conviction relief to allow DNA testing. Establishes 4-year period within which an application may be filed. Provides for proper preservation of biological material that can be

subjected to DNA testing. Requires the DNA profile of the petitioner be added to the state DNA data base. Creates DNA Testing Post-Conviction Relief for Indigents fund, to pay for DNA testing under the act.

Louisiana SB 522 (2003)

Extends the period in which a person may file an application for post-conviction DNA testing.

Maine HB 1250 (2001)

Requires prosecutors to reopen cases where sentenced offenders have had a DNA test that indicates innocence.

Maryland SB 694 (2001)

Allows a person convicted of a certain criminal offense to petition for DNA testing of evidence subjected to the chain of custody. Petitioner pays for testing, however, is reimbursed by the state if testing results are favorable to him. Michigan SB 1395 (2000) Allows convicted defendants to petition for DNA testing of biological material identified during investigation leading to conviction, and for new trial based on the results of that testing.

Missouri SB 267 (2001)

Allows incarcerated offenders to motion for DNA testing in order to demonstrate innocence. Nebraska LB 659 (2001)

Allows a convicted person to motion for DNA testing if matter was not previously tested or can be subjected to retesting with more current techniques. Costs of testing paid for by petitioner unless determined indigent by the court. If the court does not grant relief, any party may file a motion for a new trial.

Nevada AB 16 (2003)

Allows persons convicted and sentenced to death to request a genetic maker analysis of evidence in state custody which may contain information relating to the investigation or prosecution that resulted in the judgment. Allows for new trial based on new evidence discovered.

New Mexico SB 337 (2001)

Allows any person convicted of a criminal offense to petition the court to set aside the sentence or grant a new trial if DNA evidence not available at trial will establish innocence. Permits prosecution to use DNA test results for other unrelated cases. Gives petitioners one year to file.

New Mexico SB 184 (2003)

Extends repeal on law allowing petition for post-conviction DNA testing until July 2006.

North Carolina HB 884 (2001)

Allows any defendant to motion for post-conviction DNA testing. Requires indigent defendants to

receive counsel and requires the state to pay for testing if the defendant is unable to do so. Requires preservation of evidence susceptible to DNA testing.

Oklahoma SB 1381 (2000)

Creates a system to investigate and refer to prosecution, cases of indigent, presently incarcerated persons for whom post-conviction factual innocence may be demonstrated by scientific evidence. Convicted offenders serving lengthy sentences or under sentence of death are given priority under the system.

Oregon SB 667 (2001)

Allows a convicted person to motion for DNA testing no later than 48 months after the effective date of this act. Provides for petition in circuit court requesting appointment of counsel at state expense to assist the person in determining whether to file a motion. Requires interim review of various technology and evidentiary issues related to the act.

Pennsylvania SB 589 (2002)

Provides that persons sentenced to death may assert innocence in a motion for DNA testing of specific, available evidence for which DNA technology was not available at the time of the conviction, or the defendant's counsel did not seek testing, or the court refused to pay for testing for an indigent client. Upon such motion the court must ensure preservation of the biological materials. Provides that costs of ordered post-conviction testing will be paid by the

applicant, if able, and by the Commonwealth for an indigent applicant.

Rhode Island SB 2721 (2002)

Allows imprisoned offender to assert innocence in a petition for forensic DNA testing of any existing evidence, and that such testing be conducted if such evidence was not previously tested and a reasonable probability exists that the applicant would not have been prosecuted or convicted had such testing been available. Requires state to pay cost of testing unless the court finds the defendant have ability to pay. Requires preservation of biological evidence during a defendant's incarceration.

Tennessee HB 2490 (2000)

Permits defendant convicted of first degree murder and sentenced to death to petition court of conviction for fingerprint or forensic DNA analysis on evidence not tested at time of trial because technology not available or results not admissible.

Tennessee SB 796 (2001)

Expands list of offenders eligible for post-conviction DNA testing from those sentenced to death to any offender convicted of and sentenced for any criminal offense.

Texas SB 3 (2001)

Allows a convicted person to motion for DNA testing. Permits test results to be entered in DNA database.

Utah SB 172 (2001)

Allows convicted felons to motion for DNA testing. Consequences of filing petition include waiving felony statute of limitations offenses in any jurisdiction if a match is found from the DNA and the profile may be entered into DNA databanks. Instructs the state to pay for testing for those in prison, indigent and if the result is favorable to the individual. Allows victims to be notified of testing.

Virginia SB 1366 (2001)

Allows convicted felons to motion for DNA testing if the evidence was not available at trial or not previously tested, has not been tampered with and testing is relevant to establish innocence. Prohibits appeals if denied testing.

Washington SHB 2491 (2000)

Provides a procedure to conduct deoxyribonucleic acid testing of evidence for persons sentenced to death or life imprisonment

Washington Substitute SB 5896 (2001)

Expands list of offenders eligible for post-conviction DNA testing from those sentenced to death or life without parole to any incarcerated felon.

Washington HB 1391 (2003)

Allows a convicted felon to appeal a denial of post-conviction DNA testing in the event the court ruled

that such testing did not meet acceptable scientific standards or DNA technology was not sufficient at that time.

Offender motions for post-conviction DNA testing depend upon availability of crime scene evidence that may be tested. Examples (not comprehensive list) of laws concerning storage and preservation of the evidence that may be subject to DNA testing:

Arizona SB 1353 (2000)

Requires the prosecution preserve evidence that could be subject to DNA testing for the period of the proceeding. Requires the department of public safety maintain blood samples for at least thirty-five years.

California SB 1342 (2000)

Requires the preservation of evidence that may be subject to testing for the period of the defendant's incarceration.

Illinois HB 4593 (2000)

Requires preservation of physical evidence during the prosecution of certain offenses. Requires the retention of evidence after a trial for a period of time depending upon the offense.

Michigan SB 1395 (2000)

Requires preservation of any biological material for which any person may post-conviction DNA petition.

For more information contact NCSL's Criminal Justice Program in Denver, Colo., telephone 303-364-7700; or email info@)ncsl.org

**U.S. Const. Amendment V:**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**U.S. Const. Amendment XIV:**

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**42 U.S.C. § 1983. Civil action for deprivation of rights:**

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**42 U.S.C. §1985(3). Conspiracy to interfere with civil rights:**

**(3) Depriving persons of rights or privileges**

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may

have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

**Texas Code of Criminal Procedure Art. 38.43. Preservation of Evidence Containing Biological Material [formerly art. 38.29, CCP]:**

(a) In a criminal case in which a defendant is convicted, the attorney representing the state, a clerk, or any other officer in possession of evidence described by Subsection (b) shall ensure the preservation of the evidence.

(b) This article applies to evidence that:

(1) was in the possession of the state during the prosecution of the case; and

(2) at the time of conviction was known to contain biological material that if subjected to scientific testing would more likely than not:

(A) establish the identity of the person committing the offense; or

(B) exclude a person from the group of persons who could have committed the offense.

(c) Except as provided by Subsection (d), material required to be preserved under this article must be preserved:

(1) until the inmate is executed, dies, or is released on parole, if the defendant was

convicted of a capital felony; or

(2) until the defendant dies, completes the defendant's sentence, or is released on parole or mandatory supervision, if the defendant is sentenced to a term of confinement or imprisonment.

(d) The attorney representing the state, clerk, or other officer in possession of evidence described by Subsection (b) may destroy the evidence, but only if the attorney, clerk, or officer by mail notifies the defendant, the last attorney of record for the defendant, and the convicting court of the decision to destroy the evidence and a written objection is not received by the attorney, clerk, or officer from the defendant, attorney of record, or court before the 91st day after the later of the following dates:

(1) the date on which the attorney representing the state, clerk, or other officer receives proof that the defendant received notice of the planned destruction of evidence; or

(2) the date on which notice of the planned destruction of evidence is mailed to the last attorney of record for the defendant.

(e) To the extent of any conflict, this article controls over Article 2. 21.

**Texas Code of Criminal Procedure Art. 64.01. Motion:**

(a) A convicted person may submit to the convicting court a motion for forensic DNA testing of evidence containing biological material. The motion must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion.

(b) The motion may request forensic DNA testing only of evidence described by Subsection (a) that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense, but:

(1) was not previously subjected to DNA testing:

(A) because DNA testing was:

(i) not available; or

(ii) available, but not technologically capable of providing probative results; or

(B) through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing; or

(2) although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.

(c) A convicted person is entitled to counsel

during a proceeding under this chapter. The convicting court shall appoint counsel for the convicted person if the person informs the court that the person wishes to submit a motion under this chapter, the court finds reasonable grounds for a motion to be filed, and the court determines that the person is indigent. Compensation of counsel is provided in the same manner as is required by:

(1) Article 11.071 for the representation of a petitioner convicted of a capital felony; and

(2) Chapter 26 for the representation in a habeas corpus hearing of an indigent defendant convicted of a felony other than a capital felony.

**Texas Code of Criminal Procedure Art. 64.02. Notice to State; Response:**

On receipt of the motion, the convicting court shall:

(1) provide the attorney representing the state with a copy of the motion; and

(2) require the attorney representing the state to:

(A) deliver the evidence to the court, along with a description of the condition of the evidence; or

(B) explain in writing to the court why the state cannot deliver the evidence to the

court.

**Texas Code of Criminal Procedure Art. 64.03. Requirements; Testing:**

(a) A convicting court may order forensic DNA testing under this chapter only if:

(1) the court finds that:

(A) the evidence:

(i) still exists and is in a condition making DNA testing possible; and

(ii) has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect; and

(B) identity was or is an issue in the case; and

(2) the convicted person establishes by a preponderance of the evidence that:

(A) the person would not have been convicted if exculpatory results had been obtained through DNA testing; and

(B) the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.

(b) A convicted person who pleaded guilty or nolo contendere in the case may submit a motion under this chapter, and the convicting court is prohibited from finding that identity was not an issue in the case solely on the basis of that plea.

(c) If the convicting court finds in the affirmative the issues listed in Subsection (a)(1) and the convicted person meets the requirements of Subsection (a)(2), the court shall order that the requested forensic DNA testing be conducted. The court may order the test to be conducted by the Department of Public Safety, by a laboratory operating under a contract with the department, or, on agreement of the parties, by another laboratory.

(d) If the convicting court orders that the forensic DNA testing be conducted by a laboratory other than a Department of Public Safety laboratory or a laboratory under contract with the department, the State of Texas is not liable for the cost of testing. If the court orders that the testing be conducted by a laboratory described by this subsection, the court shall include in the order requirements that:

(1) the DNA testing be conducted under reasonable conditions designed to protect the integrity of the evidence and the testing process;

(2) the DNA testing employ a scientific method sufficiently reliable and relevant to be

admissible under Rule 702, Texas Rules of Evidence; and

(3) on completion of the DNA testing, the results of the testing and all data related to the testing required for an evaluation of the test results be immediately filed with the court and copies of the results and data be served on the convicted person and the attorney representing the state.

(e) The convicting court, not later than the 30th day after the conclusion of a proceeding under this chapter, shall forward the results to the Department of Public Safety.

**Texas Code of Criminal Procedure Art. 64.04. Finding:**

After examining the results of testing under Article 64.03, the convicting court shall hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted.